



In the Matter of:

U.S. DEPARTMENT OF LABOR

ARB CASE NO. 98-080

PLAINTIFF,

(ALJ CASE NO. 98-FLS-12)

v.

DATE: November 4, 1988

**MICRO-CHART, INC., A CORPORATION,
AND GARY MAXTON, INDIVIDUALLY,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Plaintiff:

Steven J. Mandel, Esq., William J. Stone, Esq., Barry H. Joyner, Esq.,
U.S. Department of Labor, Washington, D.C.

For the Respondents:

Gary L. Maxton, *pro se*, *New Carlisle, Ohio*

FINAL DECISION AND ORDER

The Administrator of the Wage and Hour Division assessed a civil money penalty (CMP) against Respondents Micro-Chart, Inc. and Gary Maxton under Section 16(e) of the Fair Labor Standards Act (FLSA or the Act), 29 U.S.C. §216(e) (1994) and 29 C.F.R. §578.3 (1997), for repeated and willful late payment of minimum wages and overtime to six of its employees. Respondents filed an exception requesting a hearing before a Department of Labor Administrative Law Judge (ALJ). The ALJ agreed with the determination of the Wage and Hour Administrator and ordered Respondents to pay the CMP. Respondents appeal on the grounds that the FLSA does not prescribe any specific time within which wages must be paid, and that the Department of Labor did not follow its own procedures when it assessed the CMP. We hold that Respondents violated the FLSA when they failed to pay their employees on their regular payday, and that the CMP was properly assessed. Therefore, we affirm the decision of the ALJ.

BACKGROUND

In 1992 and 1993, the Wage and Hour Division received complaints from employees that Respondents had failed to pay their employees on their regular bi-weekly payday. After investigation, the Wage and Hour Division found that Respondents violated the minimum wage and overtime requirements of the Fair Labor Standards Act by not paying their employees on time. T.

(Transcript of hearing) 24-26. In each instance, Respondents paid back wages due and promised to comply with the FLSA in the future. T. 24-26; 53-55.

In 1994 the Wage and Hour Division received additional complaints that Respondents had failed to pay their employees' wages on time. A Wage and Hour investigator determined from interviews with employees and payroll records that Micro-Chart usually paid its employees on a bi-weekly schedule but that some employees had not been paid for as many as 14 weeks. T. 27. Respondents paid the back wages due after being notified of this violation, but Wage and Hour assessed a CMP for repeated and willful violation of the FLSA. Using the Division's Civil Money Penalty Report form, Wage and Hour assessed a CMP of \$900 per employee but reduced the penalty by 30 percent to \$630 per employee due to the small size of Respondents' business. Wage and Hour found that Respondents had paid six employees late which, when multiplied by the CMP of \$630 for each violation, resulted in a total CMP of \$3,780. T. 29-35; *see* P (Plaintiff's Exhibit) 1 and 2. Respondents filed a timely exception to the CMP and requested a hearing.

The ALJ held that Respondents violated the FLSA when they failed to pay minimum wages due their employees on their regular pay day. ALJ Decision and Order (D & O) at 4-5. He found that Respondents' warning to newly hired employees that the payroll could be irregular did not shield them from liability, and that financial hardship is no defense to failure to pay wages due on time. *Id.* The ALJ found that Wage and Hour properly assessed a CMP for repeated and willful violations of the FLSA because the 1994 violations were the same as the violations committed in 1992 and 1993, and Respondents had been informed by Wage and Hour of the requirements of the Act. *Id.* at 6. Finally, the ALJ reviewed the methodology used by Wage and Hour to calculate the CMP and found it reasonable. *Id.* at 7.

DISCUSSION

I. Whether Respondents' untimely wage payments violated the FLSA

We agree with the ALJ that Respondents violated the FLSA in 1994 when they failed to make timely payments of wages. The Fair Labor Standards Act requires covered employers to pay their employees the minimum wage and overtime pay. 29 U.S.C. §§ 206(a) and 207(a)(1). Although the FLSA does not explicitly establish a time for payment of wages, the courts have held that the Act implicitly requires payment on the employees' regular payday as established by agreement or past practice of the parties. In a leading case on this issue the Ninth Circuit held that the language and structure of the FLSA clearly contemplate that wages due be paid on the employees' regular payday; thereafter they become "unpaid" and the employer has violated the Act. *Biggs v. Wilson*, 1 F.3d 1537, 1540 (1993). The court noted that Section 16 of the Act establishes a private right of action to collect "unpaid" minimum wages and overtime and an equal amount in liquidated damages. "The only logical point that wages become 'unpaid' is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid -- on payday." *Id.* The court also reasoned that wages must become "unpaid" at some point for the statute of limitations to begin running, and "the most logical point a cause of action for unpaid minimum wages . . . accrues is the day the employee's paycheck is normally issued, but isn't." *Id.*

Application of these principles to the facts of this case leads to the result reached by the ALJ. Micro-Chart's practice was to pay its employees on a bi-weekly basis, T. 76, but on numerous occasions in 1994 it made payments as much as seven or more weeks late. T. 78. Therefore Respondents violated the payment requirement of the FLSA.

Respondents assert that the ALJ's reliance on *Donovan v. Kaszycki & Sons Contractors, Inc.*, 599 F. Supp. 860 (S.D.N.Y. 1984), is misplaced because the court did not establish any specific time within which wages must be paid. Respondents' Appeal Petition (Pet.) at unnumbered p. 2. But the court there held that the defendants violated the minimum wage and overtime provisions of the Act by not paying workers for each workweek at the time the work was performed. It rejected the argument that the employer's intent to make payment "at some future date" was a defense to a violation of the Act. 599 F. Supp. at 869.

Respondents also rely on a holding of the district court in *Biggs v. Wilson*, 828 F. Supp. 774, 777 (E.D.Cal. 1991), that payment is timely if it is "reasonably prompt under the totality of the circumstances. . . ." Pet. at unnumbered p. 2. However, the Ninth Circuit explicitly rejected that holding: "[p]aychecks are due on payday. After that, the minimum wage is 'unpaid.'" *Biggs v. Wilson*, 1 F.3d at 1544. Other courts have reached a similar conclusion. See *Calderon v. Witvoet*, 999 F.2d 1101, 1108 (7th Cir. 1993) (placing a portion of minimum wages in a "bonus" account given to employees on their last day of seasonal employment violates the FLSA requirement of prompt payment); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (awarding liquidated damages where employer failed to pay overtime compensation at the same time as regular wages although employer had made late payment of overtime).

Department of Labor FLSA regulations and rulings also support the conclusion that wages must be paid on the employees' regular payday. Thus, the regulations require that "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. § 778.106. Moreover, in a 1961 Opinion Letter, the Department stated that "[W]hile the Act does not require that the employee's compensation must be paid weekly, it does require the employer to pay minimum wages due for the particular work week on the regular payday for the period such work week ends." Opinion Letter, No. 63 (Nov. 30, 1961).

We affirm the ALJ's holding that Respondents violated the FLSA when they paid their employees late.

II. Whether the Wage and Hour Division Appropriately Assessed a CMP against Respondents

Section 16(e) of the FLSA provides that "[a]ny person who repeatedly or willfully violated section 206 or 207 . . . shall be subject to a civil penalty of not to exceed \$1,000 for each such violation." 29 U.S.C. §216(e). Pursuant to that provision, the Wage and Hour Division assessed a CMP for repeated and willful violations of the FLSA because Respondents made late payments of wages in 1992, 1993, and 1994, and Wage and Hour had discussed the requirements of the Act with Respondents in 1992 and 1993. See *United States Dep't. of Labor v. Baystate Alternative Staffing, Inc.*, Case No. 94-FLS-22, ARB Dec., Dec. 19, 1996, slip op. at 7 (finding violations willful where

employer's president and other managers had been notified several times that their practices violated overtime requirements of the Act).

Respondents do not dispute these facts but argue that the Civil Money Penalty Report form used by Wage and Hour -- WH-467 -- requires that there be unpaid wages *due at the time* the CMP is assessed. Pet. at unnumbered p. 2. Because Respondents had paid the wages due by the time Wage and Hour assessed the CMP, Respondents assert that they were not properly subject to a CMP. *Id.* We reject this argument.

It is the language of Section 16(e) of the FLSA and its implementing regulations, 29 C.F.R. §578, and not language on the CMP Report form which determines whether a CMP may be assessed. Nothing in either the statutory provision or the regulations indicates that a CMP may not be assessed where an employer has paid the back wages after a Wage and Hour investigation has begun. Moreover, the interpretation suggested by Respondents is directly contrary to the goal of the CMP provision, which is to sanction repeat and willful offenders of the minimum wage and overtime provisions of the FLSA. If Respondents' interpretation were correct, an employer could repeatedly violate the FLSA and avoid a CMP by paying back wages before the completion of an investigation. *Cf. Brooks v. Village of Ridgefield Park*, 978 F. Supp 613, 619 (D.N.J. 1997) (Allowing employer to escape payment of liquidated damages by paying overtime compensation before liability was adjudicated would render provision of the Act "toothless").

In any event, Respondents have misread the instructions on the Civil Money Penalty Report form. That form, which is used by Wage and Hour investigators to calculate the appropriate penalty to be assessed, sets up a grid of three columns and three rows; each column represents increased seriousness of the violation.^{1/} The underlying assumption reflected by the grid is that an employer may be able to minimize, but cannot erase, a minimum wage or overtime CMP by belatedly paying the wages due. Thus, an employer such as Respondent, who has repeatedly and willfully violated the minimum wage and overtime provisions, may *reduce* the level of the penalty assessed by paying the wages due at or before the time the Wage and Hour investigator contacts the employer. However, Respondent's belated compliance with the law cannot eliminate that penalty. Thus, the grid on the Civil Money Penalty Report form is completely consistent with the Act and its implementing regulations.

^{1/} The rows represent, respectively, repeated violations, willful violations, and repeated and willful violations. The CMP is assessed by finding the intersection of the appropriate column and row, depending on the facts of the case. The Penalty Computation section of the CMP Report provides for a reduction or enhancement of the penalty, again depending on the facts of the case, and for calculation of the total amount of the CMP by multiplication of the result of all the above factors by the number of employees involved.

Respondents did not appeal any other findings and conclusions of the ALJ.^{2/} We affirm his finding that Respondents violated the FLSA repeatedly and willfully, and that the civil money penalty assessed by the Administrator was warranted by the facts in this case and was properly calculated. Accordingly, it is ordered that Respondents pay the Department of Labor a total civil money penalty of \$3,780.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA ATTWOOD

Acting Member

^{2/} Respondents make a cryptic reference to an Ohio state law but do not explain what that law provides or how it might be applicable. The violations charged and penalties imposed here are based on federal law, which makes no provision for disposing of this matter under state law.